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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA  
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9 Ernest Miranda, ) No. CV-04-462-PHX-LOA  
10 Plaintiff, ) **ORDER**  
11 vs. )  
12 JoAnne Barnhart, Commissioner of the )  
13 Social Security Administration )  
14 Defendant. )  
15

16 This matter arises on Plaintiff's Motion for an Award of Attorney Fees under 42  
17 U.S.C. § 406(b) and amended Motion for an Award of Attorney Fees under 42 U.S.C. § 406(b).  
18 (Docs. 39, 42.) Defendant has no objection to the fee requested. (Docs. 44, 46.)

19 **BACKGROUND**

20 On September 13, 2001, Plaintiff applied for disability insurance benefits and  
21 supplemental security income benefits under Titles II and XVI of the Social Security Act. (Doc.  
22 46 at 3.) The agency denied the applications both initially and on reconsideration. (Id.) An  
23 administrative law judge held a hearing on June 9, 2003, but subsequently denied Plaintiff's  
24 applications. (Id.) The Appeals Council denied Plaintiff's request for review, making the  
25 administrative law judge's decision the final decision of the Commissioner. (Id.) Plaintiff then  
26 filed a complaint in this Court seeking judicial review of the Commissioner's decision pursuant  
27 to 42 U.S.C. §§ 405(g), 1383(c)(3) with the assistance of attorney Mark Caldwell. (Id.)  
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1 Plaintiff entered a contingency fee agreement with Mr. Caldwell. (Doc. 42.)  
2 Plaintiff agreed to pay his attorney, Mr. Caldwell, up to 25% of his past-due benefits if he  
3 received a favorable judgment from the Court, or, if the Court remanded the case, a favorable  
4 decision from the Commissioner. (Id.)

5 This Court granted summary judgment in favor of Plaintiff and denied Defendant's  
6 motion for summary judgment. (Doc. 26.) The Court then remanded the case to the  
7 Commissioner for a determination of benefits. (Id.) The Commissioner subsequently issued  
8 "Notice of Award" letters to Plaintiff and his dependents. (Doc. 46 at 4.) The Commissioner  
9 indicated that a total of \$18,055.25 (25% of the amount of past due benefits) would be withheld  
10 for payment of attorney's fees (Doc. 42.) Thereafter, this Court granted a stipulation to an  
11 Award of Attorney Fees under the Equal Access to Justice Act, 28 U.S.C. § 2412, whereby  
12 Defendant agreed to pay Plaintiff's counsel \$5,469.61 in attorney fees. (Doc. 37.)

13 Plaintiff's counsel now seeks an award of attorney's fees equal to the amount  
14 remaining after the Equal Access to Justice offset, \$12,585.64 (\$18,055.25 - \$5,469.61), and  
15 further requests that any amount remaining after award of § 406(b) attorney fees be refunded  
16 directly to Plaintiff. (Doc. 42 at 4.)

17 In the pending motion, Plaintiff's counsel states that he spent 36.0 hours on this  
18 case. (Doc. 42 at 8.) Counsel has practiced law in Arizona for over 25 years and for all but his  
19 first two years of practice, he has worked almost exclusively in the area of Social Security  
20 disability law. (Id. at 9.) Counsel does not have an hourly rate because Social Security cases  
21 are only accepted on a contingency basis. However, a rate study indicates that the median  
22 hourly billing rate for an attorney with similar experience in this region is \$225.00. Altman &  
23 Weil, Small Firm Economic Survey (2002) at 52.

#### 24 **APPLICABLE LAW AND ANALYSIS**

25 42 U.S.C. § 406(b) provides that "[W]henever a court renders a judgement  
26 favorable to a claimant under this subchapter who was represented before the court by an  
27 attorney, the court may determine and allow as part of its judgement a reasonable fee for such  
28 representation, not to exceed 25 percent of the total of the past-due benefits to which claimant

1 is entitled." The attorney's fees are payable from funds withheld from a claimant's past-due  
2 disability benefits by the Social Security Administration for work performed by claimant's  
3 counsel before the district court on a claim for Title XVI benefits. In Gisbrecht v. Barnhart, 535  
4 U.S. 789, 795 (2002), the Supreme Court held that § 406(b) "does not displace contingent-fee  
5 agreements as the primary means by which fees are set for successfully representing Social  
6 Security benefits claimants in court. Rather, § 406(b) calls for court review of such  
7 arrangements . . . to assure that they yield reasonable results in particular cases." Id. at 807. So  
8 long as the contingency fee does not exceed 25% of the past-due benefits, "the attorney for the  
9 successful claimant must [merely] show that the fee sought is reasonable for the services  
10 rendered." Id.

11 In determining whether fees sought under § 406(b) are reasonable, the Court  
12 considers the character of the attorney's representation and the results achieved. Id. at 808. The  
13 Court may also consider whether Plaintiff's counsel is responsible for delay, so as to prevent the  
14 attorney from profiting from accumulating benefits while the case is pending in court, or, the  
15 Court may adjust attorney's fees when the "benefits are large in comparison to the amount of  
16 time counsel spent on the case . . . ." Id. In determining the reasonableness of attorney's fees,  
17 the Court may also consider the number of hours spent representing the claimant and the  
18 lawyer's normal hourly billing rate for non-contingent-fee cases. Id.

19 "Since Gisbrecht . . . the district courts have been deferential to the terms of  
20 contingency fee contracts in § 406(b) cases, accepting that the resulting de facto hourly rates  
21 may exceed those for non contingency-fee arrangements." Hearn v. Barnhart, 262 F.Supp. 2d  
22 1033, 1037 (N.D. Cal. 2003). Courts have approved attorney's fee awards under § 406(b) up  
23 to an effective hourly rate of \$1,433. Yarnevich v. Apfel, 259 F.Supp. 2d 1363, 1365 (N.D. Ga.  
24 2005) (discussing effective hourly rates in social security cases). Here, taking into account the  
25 EAJA offset, counsel seeks an effective hourly rate of \$501.53.<sup>1</sup> There is no evidence in the  
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27 <sup>1</sup> The calculation to determine effective hourly rate is the total fee requested divided by  
28 hours spent on the case. Roark v. Barnhardt, 221 F.Supp. 2d 1020 (W.D. Mo. 2002) (where fee  
requested was \$6,576.00, but the court used \$9,147.50, the total fee requested including EAJA

record suggesting that this amount should be reduced. There is no evidence that counsel contributed to any delay in an attempt to accrue a higher amount of past-due benefits.

Additionally, after the EAJA offset, the requested fee represents less than 25% of Plaintiff's past-due benefit award, which is below the statutory maximum and is reasonable in view of the nature of this case and counsel's representation. Counsel spent 36.0 hours on this litigation. (Doc. 42 at 8.) With the assistance of counsel, as a result of this litigation, Plaintiff was awarded not only past-due benefits for himself and his dependents back to November 2000, but also ongoing benefits to himself and his dependents if his disability continues. (Doc. 42.) Thus, the value to Plaintiff of this litigation exceeds the amount of past-due benefits.

Moreover, an attorney may not charge any fees where representation does not result in an award of benefits. 42 U.S.C. § 406(b)(1)(A), § 1383(d)(2). Civil actions for Social Security disability benefits have a high risk of loss. In 2004, federal courts found plaintiffs entitled to benefits in only 6 % of the cases. See Disability Determinations and Appeals, Fiscal Year 2004, Office of Disability Programs, January 2005, *reprinted in National Organization of Social Security Claimant's Representatives*, Forum 23, Vol. 27, No. 4 (April 2005). Accordingly, reliance on a non-contingent rate without considering the risk of loss and the contingent nature of § 406(b) fees would undercompensate counsel. Hearn, 262 F.Supp.2d at 1037. A contingent-fee agreement places the risk of loss on counsel and Plaintiff's case had a substantial risk of loss.

### **CONCLUSION**

The requested attorney's fees are reasonable under Gisbrecht and nothing in the record suggests that the fees should be reduced.

Accordingly,

**IT IS HEREBY ORDERED** that Plaintiff's Motion for an Award of Attorney Fees under 42 U.S.C. § 406(b) (Doc. 42) is **GRANTED** in the amount of \$12,585.64 and

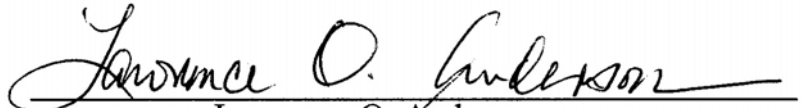
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awards already granted, to calculate effective hourly rate). In this case, the calculation is \$18,055.25 (the total amount counsel is requesting) divided by 36.0 hours.

1 shall be promptly paid out of the monies withheld by the Commissioner from Mr. Miranda's  
2 benefits.

3 **IT IS FURTHER ORDERED** that all monies remaining after payment of  
4 Plaintiff's attorney's fees in accordance with this Order that were withheld for payment of  
5 attorney's fees shall be promptly refunded directly to Plaintiff.

6 DATED this 13<sup>th</sup> day of July, 2006.

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8 Lawrence O. Anderson  
9 United States Magistrate Judge